Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

EUGENE SPARING,

Petitioner,

v.

VILLAGE OF OLYMPIA FIELDS AND
JAMES KEITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did *Payton v. New York*, 445 U.S. 573 (1980), *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and *Illinois v. Rodriguez*, 497 U.S. 177 (1990) clearly establish for qualified immunity purposes that, absent exigent circumstances, a police officer may not enter a home without a warrant to make an arrest?

2. When a police officer makes an arrest for an offense for which the officer could not reasonably believed had been committed,

   May the officer establish qualified immunity in a Section 1983 action by showing that there had been probable cause to arrest for a "related offense" without establishing that the "related offense" was directed at prohibiting the same type of conduct?

3. Does Rule 56 of the Federal Rules of Civil Rules of Procedure require a party opposing a motion for summary judgment to do more than demonstrate the existence of disputed questions of material fact, specifically to come forward with evidence to support each element of his (or her) cause of action to persuade the district court "of the merits of the claim?"

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 19, 2001.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-15) is reported at 266 F.3d 684. The opinion of the district court (App.18-37) is reported at 77 F.Supp.2d 891.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on September 19, 2001. (App. 16.) Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on November 14, 2001. (App. 17.)

CONSTITUTIONAL PROVISION AND RULE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and Rule 56 of the Federal Rules of Civil Procedure.

STATEMENT

On July 23, 1996, a man named David Smith reported to respondent police officer James Keith, a police office employed by Olympia Fields, Illinois, that Smith's former employee Thomas Sanfratello had entered Smith's office without permission and removed files. Smith also reported that Sanfratello had forged Smith's name on two checks.

Smith provided Keith with copies of the two checks; each check was payable to Sanfratello and bore Smith's forged signature. Smith also told Keith that Sanfratello's unlawful presence had been observed by petitioner Eugene Sparing.

Keith contacted petitioner on August 13, 1996. Petitioner told Keith that he had observed Sanfratello in Smith's office on July 9, 1996 at approximately 2:30 a.m. Keith then spoke with Sanfratello, who admitted that he had forged Smith's name on the checks, but stated that he had done so because Smith owed him money. Sanfratello also denied any trespass or theft of files. Keith accepted this explanation and focused his investigation on whether petitioner had given him false information.

By August 15, 1996, respondent Keith had concluded that petitioner had committed an offense by supplying false information to a police officer. That day, respondent went to petitioner's residence and knocked on the door. When petitioner came to the door and identified himself, but was still inside of his dwelling, Keith told petitioner that he was under arrest. Petitioner asked Keith if he had a warrant; Keith answered that he did not need a warrant. Petitioner then walked away from the door into his residence; Keith opened the front door, followed petitioner into the dwelling and placed petitioner under arrest for "obstructing a peace officer" on the charge that petitioner had "supplied false information that would have led to a false arrest."

The Illinois statute that defines obstructing a peace officer, 720 ILCS 5/31-1(a), had been authoritatively construed in *People v. Raby,* 40 Ill.2d 392, 240 N.E.2d 595 (1968) to require "some physical act or exertion." Petitioner had not committed any such act and the criminal charge against petitioner was dismissed on the prosecution's motion on February 4, 1997.

After dismissal of the criminal charges, petitioner filed this action under 42 U.S.C. §1983, asserting that he had been arrested without probable cause and that Keith had unlawfully entered petitioner's home without a warrant to make the arrest. Petitioner also invoked the district court's supplemental jurisdiction to advance a state tort claim for malicious prosecution against Keith and his employer, respondent Olympia Fields, Illinois.

After discovery, respondents moved for summary judgment, arguing that Keith had arrested petitioner on probable cause to believe that petitioner had obstructed a peace officer or, alternatively, that petitioner had committed the "related offense" of disorderly conduct under 720 ILCS 5/26-(a)(4) by having made a false police report. Respondents also argued that the warrantless entry to petitioner's home had been lawful and sought dismissal of the state law malicious prosecution claim on the ground that the prosecution had been based on probable cause. Respondents' motion for summary judgment did not place in issue whether the prosecutor's decision to dismiss the criminal charges satisfied the "dismissal on grounds of innocence" element of a malicious prosecution claim.

The district court agreed with petitioner that there had not been probable cause to arrest for obstructing a peace officer (Appendix 28), but held that "Sparing's conduct, as known to Keith at the time of the arrest, is sufficiently related to disorderly conduct to support his arrest." (Appendix 29.) The district court concluded that the entry into petitioner's home had been lawful because petitioner had acquiesced in respondent's statement that he did not need a warrant. (Appendix 34.) The district court reasoned that petitioner's state law

malicious prosecution claim was barred because there had been probable cause to arrest on the "related offense," (Appendix 35), and because petitioner had failed to show that the state criminal charges had been resolved in his favor. (App. 36.)

On petitioner's appeal, the Seventh Circuit agreed that petitioner could not have been lawfully arrested for obstructing a peace officer (App. 12 n.7), but upheld the finding of probable cause to arrest on the ground that there had been enough evidence to arrest petitioner for disorderly conduct. (App. 12-13.) The court of appeals concluded that respondent had unlawfully entered petitioner's home to make the warrantless arrest (App. 6-11), but held that the officer was entitled to qualified immunity because "the law surrounding Fourth Amendment 'doorway arrest' questions, particularly on the facts of this case, was not sufficiently settled or defined at the time of the arrest." (App. 11.) The court of appeals held that probable cause to arrest for a "related offense" did not bar a malicious prosecution claim, but upheld the dismissal of that claim because petitioner had not come forward with evidence to show that the criminal case had been "terminated in a matter indicative of the innocence of the accused." (App. 14.)

In his timely petition for rehearing, petitioner pointed out that the law surrounding a warrantless entry into a home to make an arrest for a misdemeanor had been clearly established by the decisions of this Court in *Welsh v. Wisconsin,* 466 U.S. 740 (1984) and *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990), and that a district judge in Illinois had reached this precise conclusion ten years before in *Owusu v. Grzyb,* 749 F.Supp. 897 (N.D.Ill. 1990). Petitioner also pointed out that

respondents had not placed in issue in their summary judgment motion the question of whether the criminal prosecution had been terminated in a matter indicative of petitioner's innocence. Petitioner argued that the rule adopted in the panel opinion — that a plaintiff opposing a motion for summary judgment must come forward with evidence to prove each and every element of his (or her) claim, even when the defendant had not raised any issue about particular elements in his summary judgment motion, was an unwarranted departure from the accepted and ordinary procedure set out in Rule 56 of the Federal Rules of Civil Procedure. Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

-I-

This case presents a question similar to that before the Court in *Hope v. Pelzer,* No. 00-309, certiorari granted January 9, 2002, order granting certiorari amended January 29, 2002.

A police officer is entitled to qualified immunity in an action under 42 U.S.C. §1983 unless "the right allegedly violated [has been] defined at the appropriate level of specificity." *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001), quoting *Wilson v. Layne,* 526 U.S. 603, 615 (1999).

In *Payton v. New York,* 445 U.S. 573 (1980), the Court set out a bright line rule that absent a warrant or exigent circumstances, police officers may not enter a person's home to make an arrest: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the

entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. at 590. The Court reaffirmed this rule in *Steagald v. United States,* 451 U.S. 204, 211-12 (1981), *Welsh v. Wisconsin,* 466 U.S. 740 (1984), and *Illinois v. Rodriguez,* 497 U.S. 177 (1990). The Court adverted to this rule in *Elder v. Holloway,* 510 U.S. 510 (1994), when it approvingly referred to the district court's conclusion "Had the arrest occurred inside the house, that court recognized, clear law would come into play: absent exigent circumstances, an arrest warrant would have been required." Id. at 512.

The Courts of Appeals for the First, Eighth and Tenth Circuits have concluded that *Payton* and its progeny clearly establish that a police officer may not lawfully enter a home to make an arrest unless the officer has a warrant or there are exigent circumstances *Buenrostro v. Collazo,* 973 F.2d 39, 43 (1st Cir. 1992); *Rogers v. Carter,* 133 F.3d 1114, 1118-19 (8th Cir. 1998); *Howard v. Dickerson,* 34 F.3d 978 (10th Cir. 1994). District courts within the Second and Eleventh Circuits have reached the same result. *Signorile By and Through Signorile v. City of New York,* 887 F.Supp. 403, 412 (E.D.N.Y. 1995); *Geidel v. City of Bradenton Beach,* 56 F.Supp.2d 1359, 1366 (M.D.Fla. 1999). The Seventh Circuit reached the contrary conclusion in this case.

In the view of the Seventh Circuit, *Payton* did not speak to the fact situation of this case, where a police officer, lacking any type of warrant and in the absence of any exigency, knocks on the door of a suspect's home and then enters the closed front door to arrest the suspect. The court below did not explain its reasoning,

other than to cite to a factually dissimilar decision, *Joyce v. Town of Tewksbury,* 112 F.3d 19 (1st Cir. 1997), where the arresting officers had an arrest warrant and entered a suspect's home in "hot pursuit." Id. at 22-23.

Before the decision of the Seventh Circuit in this case, and before respondent entered petitioner's home to make the warrantless arrest, several district judges within the Seventh Circuit had concluded that *Payton* clearly established that police officers may not, without a warrant or some exigency, enter a dwelling to make an arrest. *Owusu v. Grzyb,* 749 F.Supp. 897 (N.D.Ill. 1990); *Schwartz v. Coulter,* 1993 WL 398578 (N.D.Ill. 1993); *Alto v. City of Chicago,* 863 F.Supp. 658, 661 (N.D.Ill. 1994); *Daniels v. Keeter,* 1999 WL 639187 (N.D.Ill. 1999) The demand for factual specificity that underlies the decision of the Seventh Circuit in this case vests the clearly incompetent law enforcement officer with immunity when he (or she) violates clearly established constitutional rights and undercuts the remedy intended in 42 U.S.C. §1983.

-II-

Respondent Keith arrested and charged petitioner with a non-existent offense.[1] Even though the charge

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1. Keith arrested and charged petitioner with "obstructing a peace officer" in violation of 720 ILCS 5/31-1 by "supplying false information that would have led to a false arrest." The statute, however, had been authoritatively construed by the Illinois Supreme Court to require "physical obstruction," *People v. Raby,* 40 Ill.2d 392, 240 N.E.2d 595 (1968), and both the district court (App. 28) and the court of appeals (App. 12 n.7) agreed that a reasonable police officer could not have believed

was dismissed by the prosecution, the Seventh Circuit held that respondent was entitled to qualified immunity because he had probable cause to arrest petitioner for the "related offense" of disorderly conduct. (App. 12-13.)

Before the decision of the Seventh Circuit, there was no published decision of any court applying the Illinois disorderly conduct statute to making a false statement to a police officer.[2] The sole case relied on by the court of appeals involved a report that a crime had been committed.[3] Illinois has not enacted a "false statement"

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that petitioner had committed this offense.

2. Under 720 ILCS 5/26-(a)(4), a person commits disorderly conduct when he knowingly

> (4) Transmits in any manner to any peace officer . . . *a report to the effect that an offense has been committed,* knowing that at the time of such transmission that there is no reasonable ground for believing that such an offense has been committed. (emphasis supplied)

A similar provision was limited by the Florida Supreme Court to situations involving "a false statement knowingly uttered which creates a clear and present danger of harm to others." *State v. Saunders,* 339 So.2d 641, 644 (Fla. 1976).

3. In *People v. Stevens,* 40 Ill.App.3d 303, 352 N.E.2d 352 (1976), the defendant told the police that "$450 had been taken from him at gunpoint and that he had followed the man who had robbed him to the apartment next to where he and the officer were standing." 40 Ill.App.3d at 304, 352 N.E.2d at 353. The defendant then pointed out the alleged robber to the police, who made an arrest. The defendant admitted that he had falsely reported the robbery and was subsequently charged with disorderly

statute like 18 U.S.C. §1001, but provides criminal sanctions for making a false statement to a police officer only when information had been provided with the "intent to prevent the apprehension or obstruct the prosecution or defense of any person." 720 ILCS 5/31-4; *People v. Gray,* 146 Ill.App.3d 714, 496 N.E.2d 1269 (1986).

As applied by the Seventh Circuit, the "related offense" doctrine adds an Alice in Wonderland dimension to qualified immunity by permitting a creative advocate to concoct a qualified immunity defense for a police officer who has knowingly violated the law. The contrary rule, as explained by the First Circuit in *Sheely v. Town of Plymouth,* 191 F.3d 15 (1st Cir. 1999), limits the "related offense" doctrine to offenses which arise from the same conduct and which "share similar elements" or are "directed generally at prohibiting the same type of conduct." Id. at 19. This Court has never addressed the "related offense" doctrine; this case provides an appropriate vehicle in which to resolve the conflict among the circuits on this important issue.[4]

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conduct.

Unlike the report in *Stevens* that a robbery had been committed, this case involves responses to an officer's questions about what observations In this case, the report that a crime had been committed had been made by David Smith; in investigating Smith's report, respondent telephoned petitioner and petitioner answered Keith's questions.

4. A similar question is presented in *Williams v. Jaglowski,* petition for certiorari filed January 14, 2002.

Police officers are entitled to qualified immunity for making an unlawful arrest "if a reasonable officer could have believed that probable cause existed to arrest." *Hunter v. Bryant,* 502 U.S. 224, 228 (1991). The focus is on whether the officer "reasonably but mistakenly conclude[d] that probable cause is present." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). The officer's subjective intent is irrelevant to qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982).

Starting with *Trejo v. Perez,* 693 F.2d 482 (5th Cir. 1982), the courts of appeals have permitted a police officer who made an unlawful arrest to obtain qualified immunity by showing that "the conduct that served as the basis for the charge for which there was no probable cause could, in the eyes of a similarly situated reasonable officer, also have served as the basis for a charge for which there was probable cause." Id. at 486.

The "related offense" doctrine is easily applied to situations where a prosecutor decides to file charges for a lesser included offense. *See, e.g., Avery v. King,* 110 F.3d 12, 14 (6th Cir. 1997), (arrest for obstruction under 18 U.S.C. § 1501, arrestee charged with obstruction under 18 U.S.C. §111); *United States v. Rambo,* 789 F.2d 1289, 1294 (8th Cir. 1986) (arrest for disorderly conduct, charged with violation of "undesirable guest" statute, which is "place specific" disorderly conduct); *Babers v. City of Tallassee,* 152 F.Supp.2d 1298 (M.D.Ala. 2001) (arrest for driving under the influence of a controlled substance, charged with driving under the combined influence of alcohol and a controlled substance).

The "related offense" doctrine becomes problematic when it is used to justify a sham arrest. As

initially formulated in criminal cases, the "related offense" doctrine permitted the arrestee to introduce evidence about the subjective intent of the arresting officers to show that the arrest "was a sham or fraud at the outset, really unrelated to the crime for which probable cause to arrest was actually present to be retroactively validated." *United States v. Martinez,* 465 F.2d 79, 81-82 (2d Cir. 1972), quoting *United States v. Atkinson,* 450 F.2d 835, 838 (5th Cir. 1971). As stated in *Mills v. Wainwright,* 415 F.2d 787 (5th Cir. 1969): "The function of the Court in this situation is to determine if the arrest was merely a sham or fraud wholly unrelated to the crime for which probable cause existed to arrest the individual."

Whren v. United States, 517 U.S. 806 (1996), made plain that constitutional reasonableness does not depend "on the actual motivations of the individual officers involved." 517 U.S. at 813. Thus, the question of whether a person could have been arrested for a "related offense" must be answered without consideration of the subjective intent of the arresting officers.

The test for "related offense" applied by the Seventh Circuit in this case is whether two offenses arise from the same conduct. Under this approach, "obstructing a peace officer" by "supplying false information that would have led to a false arrest" is "related" to having committed disorderly conduct by making a false police report. This standard for "related offense" makes relatedness turn on the ingenuity of the police officer's counsel.

Although broad definitions of "related offense" appear in decision in other circuits,[5] the First Circuit concluded after a thorough analysis that there are two prongs to the "related offense" doctrine: First, the two offenses must arise from the same conduct, and second, the two offenses must "share similar elements" or be "directed generally at prohibiting the same type of conduct." *Sheely v. Town of Plymouth,* 191 F.3d 15, 19 (1st Cir. 1999), Id. at 19. This second prong of "related offense" minimizes the likelihood that creative counsel will concoct a qualified immunity defense for an officer who violated the civil rights plaintiff's clearly established rights.

The "related offense" rule applied in the Seventh Circuit does not include this second prong. All that is required for "related offenses" in the Seventh Circuit is that the two offenses arise from the same conduct.

When a police officer makes an arrest for an offense for which the officer could not reasonably believe had been committed, the officer's ability to argue that he (or she) could have reasonably believed that there had been probable cause to make an arrest for a "related offense" should be limited to offenses which are directed at prohibiting the same type of conduct or for

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5. *See, e.g., Gassner v. City of Garland, Texas,* 864 F.2d 394, 400 (5th Cir. 1989) (two offenses are related if they arise from the same conduct); *Gasho v. United States,* 39 F.3d 1420, 1428 n.4 (9th Cir. 1994) (to be "related," offense must involve "the same conduct for which the suspect was arrested").

offenses that are actually charged by the prosecution. For example, an arrest for robbery would be permissible if the officer only had probable cause to make an arrest for burglary. *Bell v. United States,* 254 F.2d 82 (D.C.Cir. 1958). But an officer should not be permitted to rely on the "related offense" rule to argue that there had been probable cause to arrest for robbery when the actual arrest was made for "investigation of vagrancy." *Collins v. United States,* 289 F.2d 129 (5th Cir. 1961).

The "related offense" rule as articulated by the First Circuit in *Sheely* strikes a much better balance than the rule currently applied in the Seventh Circuit. The First Circuit's stricter "related offense" rule prevents creative counsel from concocting a qualified immunity defense for an officer who has violated the civil rights plaintiff's clearly established rights.

-III-

The summary judgment standard applied in this case contravenes Rule 56 of the Federal Rules of Civil Procedure.

The Seventh Circuit upheld the grant of summary judgment on petitioner's malicious prosecution claim because petitioner had not come forward with evidence that the criminal prosecution had been resolved in his favor on grounds of innocence. The court of appeals answered petitioner's argument that respondent had not placed this question at issue in its motion for summary judgment by holding that "[a]t summary judgment, Sparing had an obligation to come forward with evidence to support his claim and could not merely rest on the allegations in his complaint." (App. 14.) This was the same legal standard applied by the district court, who

held that on a motion for summary judgment "the party opposing the motion must present evidence that could convince a trier of fact of the merits of the claim." (App. 36) This standard is contrary to controlling decisions of this Court.

Under Rule 56, the party moving for summary judgment bears "the initial responsibility of informing the district court of the basis for its motion" *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The opponent must then respond to the motion, but nothing in Rule 56 requires the party opposing the motion for summary judgment to prove elements of his (or her) case that have not been placed in issue by the summary judgment motion.

In *Celotex,* the defendant moved for summary judgment arguing that the plaintiff did not have any admissible evidence "about the decedent's exposure to petitioner's asbestos products." 477 U.S. 323. This motion placed on the plaintiff the burden of coming forward with evidence on this particular issue.

In this case, respondents moved for summary judgment on petitioner's malicious prosecution claim by arguing that the criminal charges had been based on probable cause. Respondents did not raise any issue about whether petitioner had evidence that the charges had been resolved in his favor on grounds of innocence.

At one time, the Seventh Circuit followed the accepted and ordinary rule that "When a party moves for summary judgment on ground A, his opponent is not required to respond to ground B—a ground the movant might have presented but did not." *Malhotra v. Cotter & Co.,* 885 F.2d 1305, 1310 (7th Cir. 1989); *Jones v.*

Owens-Corning Fiberglas Corp., 69 F.3d 712, 719 n. 7 (4th Cir. 1995); *Tavery v. United States*, 32 F.3d 1423, 1427 n. 5 (10th Cir. 1994). The Seventh Circuit abandoned this rule in *Wolf v. Buss (America) Inc.* 77 F.3d 914, 927 (7th Cir. 1996) (Rovner, J., dissenting) and, as reflected in this case, requires the party opposing summary judgment to come forward with evidence that "could convince a trier of fact of the merits of the claim." (App. 36) This standard contravenes Rule 56 and should be repudiated by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

February, 2002

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1021

EUGENE SPARING,

Plaintiff-Appellant,

v.

VILLAGE OF OLYMPIA FIELDS AND
JAMES KEITH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 97 CV 5479 —**Charles R. Norgle** *Judge.*

Argued September 18, 2000—Decided September 19, 2001

Before Easterbrook, Ripple, and Williams, Circuit Judges.

Williams, Circuit Judge. Eugene Sparing sued Officer James Keith for alleged Fourth Amendment violations, stemming from his arrest in his home. He also sued Keith and the Village of Olympia Fields under the Illinois tort of malicious prosecution. The Village and Keith moved for summary judgment, with Keith asserting a defense of qualified immunity. Relying on our decision in *United States v. Berkowitz*, 927 F.2d 1376 (7th Cir. 1991), the district court rejected Sparing's Fourth Amendment warrant claim. In addition, the district court found probable cause for Sparing's arrest on a closely related offense and rejected Sparing's Fourth Amendment probable cause and state law malicious

prosecution claims. Sparing appeals, and we affirm.

I. BACKGROUND

I.A The Facts

Sparing's arrest arose out of an alleged scheme organized by a friend named David Smith. Smith filed a criminal report with the Olympia Fields Police Department on July 23, 1996. In his complaint, Smith alleged that he fired Tom Sanfratello on May 31, 1996, and that Sanfratello later stole files from the office and forged two checks made out to himself. Smith also stated that on the morning of July 9, 1996, Sparing saw Sanfratello in the office. According to Smith, Sparing knocked on the window to get Sanfratello's attention, but Sanfratello did not respond.

In mid-August, Officer Keith called Sparing to confirm his part of Smith's story. Sparing did. Keith next interviewed Sanfratello, who disputed the story in several respects but admitted to signing the checks because he was a signatory on the account and was owed money by Smith. He also admitted to taking files, but claimed to have returned them to Smith. Sanfratello also told Keith that he previously had a conversation with Sparing's secretary, Linda Parker, who told him that she had a facsimile sent by Smith to Sparing and that she believed that they were "up to no good." Sanfratello provided a copy of that fax to Keith; it read:

> Gene
>
> July 9, 1996 at 2:45 am observed Tom at office copying files from computer and photocopying. You knocked on windows and Tom ignored you. You left and went home.
>
> Thanks
>
> David

The next day, Keith had a telephone conversation with Parker. According to Keith, Parker said that after receiving the fax from Smith, she made a copy and gave the original to Sparing, who replied, "Dave wants me to perjure myself."

The following day, Parker telephoned Keith, recounting to him an encounter she recently had with Sparing. She said that Sparing had contacted her to have lunch and that when he picked her up he asked with whom she had been talking that week. Parker initially feigned ignorance, but Sparing persisted. He drove her by the Olympia Fields Police Department to "refresh [her] memory," and again asked with whom she had been talking, this time informing her that a friend of Sanfratello had already put him in the know. She then admitted to talking with the police about the fax. Sparing, according to Parker, replied, "I thought you were my friend. How could you do this to me? Don't you know that this could lead to criminal charges against me?" Parker told Keith that Sparing then took her back home, told her to get out of the car and that she was fired. He also told Parker that he was evicting her from the house she was renting from him and taking back his van on which she was making payments. Later that day, Keith spoke with Parker again, and she told him the same story.

After the meeting with Parker, Keith went to Sparing's house and knocked on the door. Sparing answered the door, and Keith asked that he identify himself, which he did. At that moment, Sparing was still standing inside his home behind his closed screen door, and Keith was standing outside. Keith then advised Sparing that he was under arrest.[1]

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1. In his deposition, Keith indicated that he arrested Sparing for obstructing a police officer, although he also had in mind the offense of disorderly conduct.

To which, Sparing inquired whether he had a warrant. Keith stated that he did not, but rather that he had probable cause. Sparing asked whether he could place something down, then turned, and walked away from the screen door further into his home. Keith entered the residence, taking several steps inside. Sparing came back to Keith, and they both left the house.

I.B District Court Proceeding

Sparing filed a lawsuit against the Village, Keith, and Officer William Bendar, alleging violations of federal civil rights law as well as Illinois state law.[2] Sparing alleged in his complaint that his arrest was in violation of the Fourth Amendment, and he sought damages under 42 U.S.C. §1983. Specifically, Sparing complained that Keith arrested him in his home without a warrant and without probable cause. He also alleged that the Village and Keith maliciously prosecuted him in violation of Illinois tort law.

The Village and Keith moved for summary judgment. Keith asserted an affirmative defense of qualified immunity. The district court held that Sparing had failed to demonstrate a constitutional violation and that Keith was entitled to qualified immunity. The district court concluded that the arrest did not violate the Fourth Amendment because Sparing acquiesced to Keith's entry to complete an arrest announced outside his home, and because probable cause existed for an offense closely related to the one for which Sparing was arrested. Having found probable cause for the arrest, the district court also concluded that Sparing could not meet the elements of malicious prosecution. The district court then entered judgment in favor of the Village and Keith. This

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2. Sparing voluntarily dismissed his claim against Officer Bendar.

appeal followed.

II. ANALYSIS

II.A Fourth Amendment and Section 1983

Sparing alleges two Fourth Amendment violations pursuant to section 1983 against Officer Keith. He claims that Keith unlawfully entered his home without a warrant to effectuate an arrest and unlawfully arrested him without probable cause. Both claims are subject to a defense of qualified immunity. We begin our analysis with the standard for qualified immunity, and then we proceed to apply that standard to each claim.

II.A.1 Qualified Immunity

Public officials performing discretionary functions are generally entitled to qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne,* 526 U.S. 603, 609 (1999) (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). They are accorded this ample protection not as a license to violate constitutional rights without recourse nor as an excuse to turn a blind eye to the requirements of the law, but to preserve the vigilance of those individuals vested with the obligation to protect the public interest in the face of ambiguity. *See Hunter v. Bryant,* 502 U.S. 224, 228-29 (1991); *see also Malinowski v. DeLuca,* 177 F.3d 623, 626-27 (7th Cir. 1999) (articulating policy reasons behind the immunity).

When presented with a defense of qualified immunity, courts must (1) determine whether the plaintiff has alleged the deprivation of an actual constitutional right and (2) if so, determine whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz,* 121 S. Ct.

2151, 2156 (2001); *Layne,* 526 U.S. at 609; *Spiegel v. Cortese,* 196 F.3d 717, 723 (7th Cir. 1999). Although qualified immunity is an affirmative defense, the burden of defeating an assertion of qualified immunity rests with the plaintiff. *Spiegel,* 196 F.3d at 723; *Clash v. Beatty,* 77 F.3d 1045, 1047-48 (7th Cir. 1996).

In this case, the district court, in granting summary judgment, found that Sparing could not establish a deprivation of an actual constitutional right and therefore did not fully address the second part of the standard for qualified immunity. We review the district court's judgment on the basis of qualified immunity de novo. *Jones v. Watson,* 106 F.3d 774, 777 (7th Cir. 1997). In determining whether a genuine issue of material fact exists, we construe all facts in the light most favorable to the non-moving party, and draw all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

II.A.2 Warrantless arrest in the home–the significance of Payton, Watson, Santana, and Berkowitz

Sparing argues that Keith entered his home without a warrant or his consent to effectuate an arrest, which constituted an unreasonable search in violation of the Fourth Amendment and in particular the Supreme Court's holding in *Payton v. New York,* 445 U.S. 573 (1980). Keith responds that Sparing acquiesced to his slight entry to complete the arrest after he announced it outside Sparing's home, which is consistent with Payton and indistinguishable from our holding in *United States v. Berkowitz,* 927 F.2d 1376 (7th Cir. 1991). For the reasons stated below, we believe that the entry into Sparing's home without a warrant to effectuate or complete the arrest (although with probable cause) was unreasonable and therefore a violation of the Fourth Amendment.

Two Fourth Amendment principles set the backdrop against which we analyze this case. First, police officers

may constitutionally arrest an individual in a public place (e.g., outside) without a warrant, if they have probable cause. *United States v. Watson,* 423 U.S. 411, 417-24 (1976). Second, police officers may not constitutionally enter a home without a warrant to effectuate an arrest, absent consent or exigent circumstances, even if they have probable cause. *Payton,* 445 U.S. at 585-90. What distinguishes these two cases is that the latter involves an entry (i.e., a search) into the home, a place where individuals enjoy an especially heightened Fourth Amendment protection. *See id.* at 585 (''[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'' (internal quotation marks omitted) (quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972)). The former does not. A search of the home without a warrant is a well-settled violation of the Fourth Amendment, and the Supreme Court in Payton simply made clear that it is no less so when the search is conducted in order to seize (i.e., by an arrest) a person, rather than property. *See id.* at 585-88.

At first blush, then, the lines appear clear. Intrusion into the home without a warrant ''by even a fraction of an inch,'' is too much. *Kyllo v. United States,* 121 S. Ct. 2038, 2045 (2001) (internal quotation marks omitted) (quoting *Silverman v. United States,* 365 U.S. 505, 512 (1961)). The lines are not so clear, however, because exactly where outside ends and where the home begins is not a point immediately obvious. Splitting fractions of an inch can be a very treacherous endeavor, producing arbitrary results. But we need not pull out our rulers and begin to measure. Under the Fourth Amendment, the point must be identified by inquiry into reasonable expectations of privacy. *United States v. Santana,* 427 U.S. 38, 42 (1976); *Katz v. United States,* 389 U.S. 347 (1967).

The Supreme Court has already considered the question of dividing outside from inside when the home is involved,

although not completely resolving the question, in *United States v. Santana, supra.* In *Santana,* the Court held that an individual voluntarily standing in the threshold of her home (i.e., in the middle of an open doorway) is outside rather than inside the home for purposes of the Fourth Amendment. *Santana,* 427 U.S. at 42. The Court reasoned that an individual voluntarily standing in an open doorway has knowingly exposed herself to "public view, speech, hearing, and touch" just as if she were standing outside, in a public place. Id. In those places, and thus in an open doorway, under those circumstances, the Watson rule, rather than the *Payton* rule, applies. Id.; *see also Katz,* 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

But what if the individual is not voluntarily standing in an open doorway, but answers a knock at the door, standing by a "fraction of an inch" behind an open doorway? We still apply Santana-type "public view, speech, hearing, and touch" analysis to aid in the determination of whether a reasonable expectation of privacy exists. To answer that *Payton* established "a firm line at the entrance to the house," *Payton,* 445 U.S. at 590, is to ignore an unmistakable circularity—the question is where is the "entrance to the house," which in these circumstances must be answered by consideration of reasonable expectations of privacy.

We addressed precisely this question in *United States v. Berkowitz, supra,* acknowledging that when an individual voluntarily stands behind an open doorway—fractions of an inch "inside the home"—ordinarily, for purposes of the Fourth Amendment, she stands outside, in a public place. *See Berkowitz,* 927 F.2d at 1386-87; *cf. Santana,* 427 U.S. at 42. But, we said, the inquiry does not end there. We also recognized that a person does not surrender reasonable expectations of privacy in the home by simply answering a knock

at the door, and we therefore declined to apply *Santana* in toto.[3] *Berkowitz,* 927 F.2d at 1387. Instead, we held that an individual retains the right to be free from physical intrusion into the home by police officers without a warrant seeking to effectuate an arrest, but the right could be waived in that circumstance by acquiescence (rather than consent) to a slight entry. We stated our holding as follows: if the police go to an individual's home without a warrant, knock on the door, announce from outside the home that the individual is under arrest when she opens the door to answer, and the individual acquiesces to a slight entry to complete the arrest,[4] the entry is reasonable under the Fourth Amendment and consistent with Payton. Id.

Berkowitz, however, did not overturn longstanding Fourth Amendment precedent that absent exigent circumstances, police without a warrant must obtain an

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3. Other courts have reached similar conclusions. See *United States v. McCraw,* 920 F.2d 224, 228-30 (4th Cir. 1990); *Duncan v. Storie,* 869 F.2d 1100, 1103 (8th Cir. 1989); *United States v. Herrold,* 772 F. Supp. 1483, 1489-90 (M.D. Pa. 1991). *But see United States v. Carrion,* 809 F.2d 1120, 1127-28 (5th Cir. 1987); *United States v. Whitten,* 706 F.2d 1000, 1015 (9th Cir. 1983).

4. *Berkowitz* actually states this proposition using the words "and the person acquiesces to the arrest." 927 F.2d at 1386 (emphasis added). The issue, however, is whether the entry is consistent with the Fourth Amendment, not the arrest (which is lawful because supported by probable cause). Despite the language used in that particular sentence, we believe the holding in *Berkowitz* identified the entry as the constitutional violation, not the arrest, and therefore we use the former, not the latter.

individual's valid and voluntary consent before entering the home to effectuate or complete an arrest. *See, e.g., Steagald v. United States,* 451 U.S. 204, 214 n.7 (1981); *Reardon v. Wroan,* 811 F.2d 1025, 1027-28 (7th Cir. 1987). As we have said, *Berkowitz* only endorsed as reasonable under the Fourth Amendment, a slight entry into the home to complete an arrest announced outside the home when the individual acquiesced to the entry while standing fractions of an inch behind the threshold of her home with the door open. *See Berkowitz,* 927 F.2d at 1386-87.

This case does not fit within the thin middle ground established by *Berkowitz,* but is a case where Payton applies. What puts this case beyond *Berkowitz*—as well as Santana and Watson—and is most critical here, is that Sparing stood inside his home, behind his closed screen door. He was neither in a public place, e.g., outside *(Watson),*[5] voluntarily in an open doorway, also a public place *(Santana),* or answering a knock at the door and standing fractions of an inch behind an open doorway *(Berkowitz).* Because we are guided not by the "common law of property," *Santana,* 427 U.S. at 42, but by the Fourth Amendment privacy interest as identified in *Katz,* this difference is significant. Sparing was not exposed to "public view, speech, hearing, and touch" as if he were standing outside, in a public place (voluntarily or otherwise). As a consequence, we apply *Payton*—Sparing did not surrender any reasonable expectations of privacy in his home. Without a warrant, this arrest could only be completed if Sparing opened his screen door, and stepped outside of his home or acquiesced to a slight entry to complete the arrest. For Keith to enter the home without a warrant, as he did in this case, he first needed Sparing's consent.

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5. Watson actually was arrested in a restaurant.

We need not question the validity and voluntariness of consent in this case, because no evidence of consent is present. Because Sparing did not consent to Keith's entry into his home, Keith's entry without a warrant to effectuate or complete the arrest in Sparing's home was unreasonable and a violation of the Fourth Amendment. We pause here, momentarily, to reiterate what seems to have been lost from our discussion in *Berkowitz:* there was no reason in this case not to get a warrant and every reason to obtain one. *See Berkowitz,* 927 F.2d at 1388 ("Obtaining a warrant in the first place would have prevented these potential problems, to say nothing of the time it would have saved at trial and on appeal litigating the legality of [the] arrest."). When time permits, officers who elect not to obtain a warrant unnecessarily risk the type of constitutional violation involved in this case.

Although Sparing has demonstrated a constitutional violation, he cannot show that the violation was clearly established under the second part of the standard for qualified immunity. Indeed, we are in agreement with the First Circuit in concluding that the law surrounding Fourth Amendment "doorway arrest" questions, particularly on the facts of this case, was not sufficiently settled or defined at the time of the arrest to defeat qualified immunity in this case. *See generally Joyce v. Town of Tewksbury,* 112 F.3d 19, 22 (1st Cir. 1997) (en banc). Thus, Keith was appropriately entitled to summary judgment for Sparing's Fourth Amendment warrant claim under section 1983.[6]

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6. Sparing presents an additional Fourth Amendment argument based on the Illinois resisting arrest statute: Sparing argues that he was required by Illinois law to acquiesce to Keith's entry to complete the arrest, and if he resisted by not acquiescing to the entry, he was subject to additional charges for resisting arrest. He argues that if he acquiesced, the Illinois statute compelled his

II.A.3 Arrest without probable cause

Sparing next argues that the district court employed a "fanciful view of Illinois law and a warped reading of the record" in concluding that his participation in Smith's scheme could have provided Keith with probable cause to believe that he had committed the offense of disorderly conduct. Therefore, he argues, the district court erred in granting summary judgment to Keith on his Fourth Amendment probable cause claim.[7] Sparing contends that the section of the Illinois disorderly conduct statute under which the district court found probable cause for the arrest requires a written report and that the report must falsely identify an offense, not simply acts that may be part of an offense.

The disorderly conduct statute provides:

(a) A person commits disorderly conduct when he

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acquiescence and as a consequence that acquiescence is constitutionally defective. Having decided that *Berkowitz* does not apply, we need not consider this issue.

7. The district court did not find probable cause for the charge of obstructing a police officer--the offense for which Sparing was arrested and charged--because Sparing's conduct could not be considered physical obstruction, which is a necessary element of the offense. *See People v. Hilgenberg,* 585 N.E.2d 180, 183 (Ill. App. Ct. 1991). But the district court continued to consider whether probable cause existed for disorderly conduct because "probable cause need not have existed for the charge for which the plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge." *Biddle v. Martin,* 992 F.2d 673, 676 (7th Cir. 1993).

> knowingly:
> * * *
> (4) Transmits or causes to be transmitted in any manner to any peace officer, public officer or public employee a report to the effect that an offense will be committed, is being committed, or has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense will be committed, is being committed, or has been committed[.]

720 Ill. Comp. Stat. 5/26-1(a)(4). Illinois case law, in particular *People v. Stevens,* 352 N.E.2d 352 (Ill. App. Ct. 1976), establishes that either written or oral reports may satisfy the element of a "report" in the statute. Id. at 354.

Sparing attempts to distinguish Stevens, while at the same time advancing his second argument, by stating that the defendant in Stevens reported a "robbery." He argues that he only relayed information to Keith about what he had seen and never stated that an "offense" had been committed. This is a fanciful interpretation of both Stevens and the disorderly conduct statute. The plain language of the statute is not limited to false reports of an offense, as Sparing argues, but covers false reports "to the effect that an offense . . . has been committed." 720 Ill. Comp. Stat. 5/26-1(a)(4). When Sparing told Keith that he had seen Sanfratello in the office copying files from a computer and photocopying, it was to corroborate Smith's accusation of theft and trespass. Clearly, the report had the effect of falsely conveying to a police officer that an offense had been committed.

Thus, Keith was also appropriately entitled to summary judgment for Sparing's Fourth Amendment probable cause claim under section 1983.

II.B Malicious Prosecution

Sparing argues that for the reasons articulated in his probable cause discussion addressed above, the district court wrongly granted summary judgment to the Village and Keith on his state law malicious prosecution claim. Because we have disposed of his arguments on probable cause, Sparing is left empty-handed. However, we will address this issue because we uphold summary judgment on the second ground offered by the district court. We review this claim, like the others, de novo.

We are not convinced, as was the district court, that because probable cause existed for the offense of disorderly conduct, Sparing could not maintain a state law malicious prosecution cause of action for resisting or obstructing a police officer--the offense actually charged. We are aware of no Illinois case that adopts the closely related offense rule, which we apply in qualified immunity cases, in state law malicious prosecution tort cases. Therefore, we do not rest our opinion on this ground.

However, Illinois law does require that the criminal proceeding upon which a malicious prosecution action is predicated was terminated in a manner indicative of the innocence of the accused. *Joiner v. Benton Cmty. Bank*, 411 N.E.2d 229, 232 (Ill. 1980). The record is silent on this issue, except for Keith's assertion in his deposition that the case was dismissed for lack of a warrant (hardly indicative of Sparing's innocence). At summary judgment, Sparing had an obligation to come forward with evidence to support his claim and could not merely rest on the allegations in his complaint. See Fed. R. Civ. P. 56(e). He failed to do so.

Therefore the Village and Keith were appropriately entitled to summary judgment for Sparing's state law malicious prosecution claim.[8]

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is Affirmed.

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8. We do not reach the issues of damages raised on this appeal, because we affirm the district court's grant of summary judgment in favor of the Village and Keith on all counts alleged in the complaint.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1021

EUGENE SPARING,

Plaintiff-Appellant,

v.

VILLAGE OF OLYMPIA FIELDS AND
JAMES KEITH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 97 CV 5479 —**Charles R. Norgle** *Judge.*

[September 19, 2001]

JUDGMENT — ORAL ARGUMENT

Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-1021

EUGENE SPARING,

Plaintiff-Appellant,

v.

VILLAGE OF OLYMPIA FIELDS AND
JAMES KEITH,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 97 CV 5479 —**Charles R. Norgle** *Judge.*

[November 14, 2001]

ORDER

Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Ann C. Williams, Circuit Judge

On consideration of the petition for rehearing and petition for rehearing *en banc,* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 97 CV 5479

EUGENE SPARING,

Plaintiff,

v.

VILLAGE OF OLYMPIA FIELDS AND
JAMES KEITH,

Defendants.

MEMORANDUM OPINION AND ORDER

NORGLE, J. Eugene Sparing (''Sparing'') brought this suit alleging that James Keith (''Keith''), a police officer with the Village of Olympia Fields, violated Sparing's civil rights by entering his home and arresting him without a warrant and without probable cause. Sparing seeks damages under 42 U.S.C. § 1983 for the alleged civil rights violations, and also invokes the court's supplemental jurisdiction to assert the Illinois tort of malicious prosecution against Keith and the Village (where appropriate, ''Defendants''). Defendants now move for summary judgment, while Sparing moves for summary judgment on his § 1983 claims. For the following reasons, the court grants Defendants' motion and denies Sparing's motion.

I. BACKGROUND[1]

On July 23, 1996, David Smith ("Smith") filed a criminal report with the Olympia Fields Police Department. Smith, an accountant, told Keith that he terminated an employment relationship with Tom Sanfratello ("Sanfratello") on May 31, 1996. Smith complained that Sanfratello took files from Smith's office, prepared checks made out to himself, and forged Smith's signature on the checks. Smith said his friend, Sparing, saw Sanfratello in Smith's office on July 9, 1996 at 2:30 a.m. Sparing allegedly knocked on the window to get Sanfratello's attention, but Sanfratello ignored him.

On August 13, 1996, Keith telephoned Sparing, asking him to verify Smith's version of events, and Sparing did so. Later the same day, Keith questioned Sanfratello about the alleged incident. Sanfratello disputed the story, claiming that he did not leave Smith's employment until June 10, 1996. Sanfratello admitted taking files, but claimed that he returned them to Smith. Sanfratello also admitted signing checks, but maintained he was a signatory on the account, and Smith owed him money.

Sanfratello also told Keith about a conversation he had with Sparing's secretary, Linda Parker ("Parker"). Parker allegedly told Sanfratello that Smith and Sparing were "up to no good."[2] (Defs.' Rule 12(M) stmt. par. 6.) According to

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1. The court takes the facts from the parties Local Rule 12 statements, and discusses any factual disputes in the text. On September 1, 1999, Local Rules 12(M) and 12(N) were re-numbered to Local Rules 56. 1(a) and 56. 1(b). Consistent with the parties submissions, the court cites the former numbering system in this opinion.

2. Sparing objects to this statement, and other statements, as hearsay. (See Pl.'s Rule 12(N) reply, pars. 6, 9, 10.) As discussed below, the court does not consider the

Sanfratello, Parker said that Smith faxed a message to Sparing about Sparing's alleged observation of Sanfratello at Smith's office. Sanfratello gave Keith a copy of the fax, which read:

> Gene:
> July 9, 1996 at 2:45 a.m. [you] observed Tom at office copying files from computer and photocopying. You knocked on windows and Tom ignored you. You left and went home.
> Thanks,
> David

(Defs.' Rule 12(M) stmt. par. 7.)

On August 14, 1996, Keith telephoned Parker to investigate Sanfratello's story, and prepared a written report of this telephone interview. According to Keith's report, Parker told Keith that she received the fax from Smith and gave it to Sparing, who allegedly said "Dave [Smith] wants me to perjure myself." (Defs.' Rule 12(M) stmt. par. 9.)

The next day, Parker telephoned Keith to tell him that Sparing confronted her about the conversation she had with Keith the previous day. According to Parker, she met Sparing for lunch, where he asked her with whom she had been speaking. Parker did not answer Sparing's question, but later Sparing drove her by the Olympia Fields police station to "refresh her memory." Parker then told Sparing that she

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statements for their truth. (See infra, Part II.B.2.) Rather, the court considers the statements to review the information known to Keith at the time of Sparing's arrest. Therefore, Sparing's objections are overruled.

spoke with the police about the fax from Smith. According to Parker, Sparing responded "I thought you were my friend," and asked "How could you do this to me?" and "Don't you know this could lead to criminal charges against me?" (Defs.' Rule 12(M) stmt. par. 10.) Parker claimed that Sparing then fired her, told her that he would be evicting her from the house she rented from him, and that he was taking back a van on which she was making payments. Later the same day, Keith interviewed Parker in person, where she restated the things she told Keith in their telephone conversation.

Following this meeting with Parker, Keith went to Sparing's residence/business and knocked on the door. A man answered the door, and identified himself as Sparing. Keith then told Sparing he was under arrest. At the time Keith announced the arrest, Keith was standing outside the threshold, and Sparing was standing inside the screen door. Then, Sparing asked if Keith had a warrant. Keith replied that he did not need one because he had probable cause to believe Sparing committed a crime. After Keith announced the arrest, Sparing asked to put something down, and walked farther into his residence. At that time, Keith stepped inside Sparing's residence. Sparing returned to the doorway, and walked outside with Keith, who then handcuffed Sparing and took him to the Olympia Fields police station. Sparing was charged with obstructing a peace officer in violation of 720 ILCS 5/31-1. According to Sparing, Keith offered to release Sparing if he would provide evidence against Smith. Sparing claims that during the ride to the police station, Keith said "You're going to have to change your story. You're going to have to cooperate. And if you testify against Smith, then I won't arrest you." (Pl.'s Rule 12(N) stmt. par. 6.) Sparing also claims Keith said that if Sparing "told the right story" and testified against Smith, "this will be over for you." (Pl.'s Rule 12(N) stmt. par. 7.) Keith denies making these statements.

At the time of his arrest, Sparing claims he was selected to be a director of a business that was in the process of going public. As a member of the board of directors, Sparing would have been entitled to purchase 100,000 shares of stock at $0.075 per share. The stock, which is not yet publicly traded, sold for $2.00 per share during the summer of 1999. Sparing asserts that he lost this opportunity because Keith arrested him. Defendants disagree and argue that Sparing was not officially approved as a director at the time of his arrest.

On August 7, 1997, Sparing filed a four count complaint against Keith, the Village, and William Bednar.[3] Count I, brought under 42 U.S.C. § 1983, claims that Keith violated Sparing's Fourth Amendment rights when he entered Sparing's residence without a warrant. Count II, another § 1983 claim, alleges that Keith violated Sparing's Fourth Amendment rights when he arrested Sparing without probable cause. Count IV is brought under the court's supplemental jurisdiction, and alleges the Illinois tort of malicious prosecution against Keith and the Village on the theory of respondeat superior. A large part of Sparing's claimed damages is the purported lost investment opportunity.

In their motion for summary judgment, Keith and the Village argue that Keith has qualified immunity against the § 1983 claims because Keith did not arrest Sparing in his home, and because Keith had probable cause to make the arrest. Keith and the Village also argue that the malicious prosecution claim fails because Keith had probable cause,

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3. William Bednar is a police officer in Park Forest, Illinois. Count III was directed to Officer Bednar, which Sparing voluntarily dismissed on February 3, 1998.

and because ofthe Illinois Tort Immunity Act, 745 ILCS §§ 10/2-109 and 10/2-208. Alternatively, Keith and the Village argue that Sparing's claimed damages are speculative, and not recoverable.

In Sparing's motion on the § 1983 claims, he argues that Keith did not have probable cause to make the arrest, and that he is entitled to judgment because Keith admits to entering Sparing's home. Sparing does not move for summary judgment on his malicious prosecution claim, rather, he asserts that a trial is necessary. Sparing also maintains that the alleged damages are not speculative, and should be resolved at trial.

II. DISCUSSION

II.A Standard for Summary Judgment

Summary judgment is permissible when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The nonmoving party cannot rest on the pleadings alone, but must identify specific facts, see *Cornfield v. Consolidated High School District No. 230,* 991 F.2d 1316, 1320 (7th Cir. 1993), that raise more than a mere scintilla of evidence to show a genuine triable issue of material fact. *See Murphy v. ITT Educational Services, Inc.,* 176 F.3d 934, 936 (7th Cir. 1999). In other words, summary judgment is the "put up or shut up" stage of a lawsuit, when the party opposing the motion must present "what evidence it has that would convince a trier of fact to accept its version of events." *Shank v. William R. Hague, Inc.,* 192 F.3d 675, 682 (7th Cir. 1999) (citing *Schacht v. Wisconsin Dep't of Corrections,* 175 F.3d 497, 503-04 (7th Cir. 1999)). In deciding a motion for summary judgment, the court can only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See, Bombard v. Fort Wayne Newspapers, Inc.,* 92 F.3d 560, 562 (7th Cir. 1996). The court views the record and all reasonable inferences drawn therefrom in the light most favorable to the party opposing summary

judgment. See Fed.R.Civ.P. 56(c), s *ee also, Perdomo v. Browner,* 67 F.3d 140, 144 (7th Cir. 1995). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *See United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962), *see also, First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 280 (1968); *Wolf v. Buss (America) Inc.,* 77 F.3d 914, 922 (7th Cir. 1996). The choice between reasonable inferences from facts is a jury function. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

II.B Qualified immunity

II.B.1 In general

Government officials have qualified immunity against § 1983 liability "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Wollin v. Gondert,* 192 F.3d 616, 622 (7th Cir. 1999) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The rationale behind the qualified immunity doctrine is to protect public officers from "undue interference with their duties and from potentially disabling threats of liability ...." *Wollin,* 192 F.3d 616, 622 (citing *Jenkins v. Keating,* 147 F.3d 577, 584-85 (7th Cir. 1998)). The immunity operates to avoid "excessive disruption" of government, and permits "the resolution of many insubstantial claims on summary judgment." *See Wollin,* 192 F.3d 616, 622 (quoting *Harlow,* 457 U.S. at 818 (1982)). The existence of qualified immunity is a question for the court, which should resolve the issue as early as possible. *See Biddle v. Martin,* 992 F.2d 673, 676 (7th Cir. 1993) (noting that a false arrest case should not go to trial if there is any reasonable basis to find probable cause) (citing *Hunter v. Bryant,* 502 U.S. 224, 228 (1991) and *Cross v. City of Des Moines,* 965 F.2d 629, 632 (8th Cir. 1992)); *see also Alvarado v. Picur,* 859 F.2d 448, 451 (7th Cir. 1988) (holding that the question of qualified immunity is a question of law for the court).

Qualified immunity is a two part analysis. First, the court considers whether the plaintiff has produced evidence of a violation of a federal constitutional right. *See Spiegel v. Cortese,* 196 F.3d 717, 722 (7th Cir. 1999) (citing *Eversole v. Steele,* 59 F.3d 710, 717 (7th Cir. 1995)). If so, the court considers whether the constitutional standards implicated were clearly established at the time in question. *See Spiegel,* 196 F.3d 717, 722. The defendant is entitled to qualified immunity if the answer to either inquiry is negative. *See Chan v. Wodnicki,* 123 F.3d 1005, 1008 (7th Cir. 1997) (noting the plaintiff's burden to establish that, under clearly established law, the defendant official would understand that his actions violate the plaintiff's rights). Although qualified immunity is a defense, the plaintiff has the burden of establishing that the defendant violated a clearly established constitutional right. *See Spiegel,* 196 F.3d 717, 722.

II.B.2 Probable cause

The court first addresses Sparing's claim that he was arrested without probable cause, and Keith's assertion that he is entitled to qualified immunity against that claim. After reviewing the parties briefs, Local Rule 12 statements, and supporting materials, the court finds the first qualified immunity question dispositive. *See Khuans v. School Dist. 110,* 123 F.3d 1010, 1018 (7th Cir. 1997) (finding qualified immunity applied after reviewing the first step in the qualified immunity analysis); *compare Chan,* 123 F.3d at 1008 (noting that most courts go directly to second inquiry). As described below, Keith is entitled to qualified immunity because Sparing presents no evidence that Keith did not have probable cause.

The constitutional right at issue is Sparing's right to be free from arrest without probable cause. "It is axiomatic that '[a] warrantless arrest ... must be supported by probable cause.'" *United States v. Sholola,* 124 F.3d 803, 814 (7th Cir. 1997) (quoting *United States v. Navarro,* 90 F.3d 1245, 1254 (7th Cir. 1996)). The court's determination of probable

cause is an objective test, focusing on the information known to officers at the time of arrest. See *Spiegel,* 196 F.3d 717, 723 n. 1 (noting that a probable cause determination is less than a "more likely than not" test, but how much less will depend on the circumstances) (citing *Gramenos v. Jewel Companies,* 797 F.2d 432, 438 (7th Cir. 1986)). Probable cause itself is a "'commonsense determination, measured under a reasonableness standard,' the arresting officer's knowledge'" would warrant a reasonable person to believe that a crime had been committed. *See Spiegel,* 196 F.3d 717, 723, (quoting *Tangwall v. Stuckey,* 135 F.3d 510, 519 (7th Cir. 1998) and *Qian v. Kautz,* 168 F.3d 949, 953 (7th Cir. 1999)). In other words, "the inquiry is whether an officer has reasonable grounds on which to act[.]" *Spiegel,* 196 F.3d 717, 723 (quoting *Kelley v. Myler,* 149 F.3d 641, 647 (7th Cir. 1998)). With these principles in mind, the court examines the information known to Keith at the time he arrested Sparing.

The tale begins with Smith's report to Keith, where Smith complained that Sanfratello took files from Smith's office and forged Smith's name on checks. Smith's story led Keith to question Sparing and Sanfratello. Sanfratello, in turn, led Keith to Parker, who provided ample evidence for a reasonably prudent person to believe that Sparing had committed a crime. First, Parker told Keith that she received the fax from Smith and gave it to Sparing, who allegedly said "Dave [Smith] wants me to perjure myself." (Defs.' Rule 12(M) stmt. par. 9.) The fax itself appears to be instructions from Smith to Sparing about Sparing's alleged sighting of Sanfratello in Smith's office. Second, Parker told Keith that Sparing confronted her about her conversations with Keith, and drove her past the Olympia Fields police station, saying "I thought you were my friend," and asking "How could you do this to me?" and "Don't you know this could lead to criminal charges against me?" (Defs.' Rule 12(M) stmt. par. 10.) Finally, Parker told Keith that Sparing fired her, told

her he was going to evict her, and that he was taking back a van on which she had been making payments. Again, it is irrelevant whether Parker's statements were correct, or whether Sparing actually made the statements that Parker related to Keith. *See Spiegel,* 196 F.3d 717, 723; *cf. Wollin,* 192 F.3d 616, 621 (noting that a court reviewing an officer's determination of probable cause should not ask, after the fact, if there was a more reasonable interpretation of events) (citing *Humphrey v. Staszak,* 148 F.3d 719, 725 (7th Cir. 1998)). Rather, the question is whether Keith had reasonable grounds on which to act. *See Spiegel,* 196 F.3d 717, 723. On these facts, the court finds that Keith had reasonable grounds to believe that Sparing fabricated the story about Sanfratello, and that Sparing and Smith conspired to frame Sanfratello. Therefore, the court answers the first qualified immunity question in the negative, and finds, as a matter of law, that Keith had probable cause to arrest Sparing.

Despite the deferential rules of probable cause, Sparing argues the intricacies of law, and contends that Keith did not have probable cause to arrest Sparing for obstructing a police officer, 720 ILCS § 5/31-1, the crime with which Sparing was charged.[4] Sparing relies on *People v. Raby,* 40 Ill.2d 392, 240 N.E.2d 595 (1968) to argue that obstructing a peace officer requires a physical obstruction, rather than merely

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4. The statute reads, in relevant part:
720 ILCS 5/31-1. Resisting or obstructing a peace officer or correctional institution employee.
(a) A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer or correctional institution employee of any authorized act within his official capacity commits a Class A misdemeanor.

providing false information to an officer. Because Sparing did not physically obstruct Keith, Sparing argues that Keith could not have had probable cause to arrest Sparing for obstructing a police officer. Sparing further argues that Keith did not have probable cause to arrest Sparing for disorderly conduct. According to Sparing, the Illinois disorderly conduct statute, 720 ILCS § 5/26-1, only applies to persons that file a false police report.[5] Because Sparing did not file a formal police report, he argues that Keith could not have probable cause to arrest Sparing for disorderly conduct.

Keith submits that he had probable cause to arrest Sparing for obstructing a police officer, and also maintains that he had probable cause to arrest Sparing for disorderly conduct, which Keith claims is closely related to obstructing a police officer. According to Keith, a § 1983 claim based on false arrest will fail if probable cause exists for a crime that is closely related to the crime charged. *See Biddle*, 992 F.2d at 676-77 (and cases cited therein).

The court agrees with Sparing that physical obstruction is a necessary element of the crime of obstructing a peace officer. *See People v. Hilgenberg*, 223 Ill.App.3d 286, 165

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5. The statute reads, in relevant part:
720 ILCS 5/26-1. Disorderly conduct.
(a) A person commits disorderly conduct when he knowingly:
(4) Transmits or causes to be transmitted in any manner to any peace officer, public officer or public employee a report to the effect that an offense will be committed, is being committed, or has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense will be committed, is being committed, or has been committed....

Ill.Dec. 784, 585 N.E.2d 180, 183 (1991). Nonetheless, the court finds Keith's argument persuasive. "Probable cause need not exist [ ] for the charge for which plaintiff was arrested, so long as probable cause existed for arrest on a closely related charge." *Biddle,* 992 F.2d at 676. The court is to "strike a balance which allows the arresting officer to choose which crime she will charge without having to charge every single offense sustainable on the facts, and yet does not 'open [ ] the door to the extrapolation of offenses in an effort to justify a sham arrest.'" *Id.* (quoting *Trejo v. Perez,* 693 F.2d 482, 485 (5th Cir. 1982)). Indeed, the court does "not consider all the possible charges [Sparing's] conduct might support." *Biddle,* 992 F.2d at 677; *see also Spiegel,* 196 F.3d 717, 723 n. 1 (stating that the court could not "emphasize enough" that an officer does not need probable cause as to every element of an offense, rather, the officer needs enough information to believe that the "arrestee was committing, or had committed a crime") (citing *Hunter v. Bryant,* 502 U.S. 224, 228 (1991)). The court finds that Sparing's conduct, as known to Keith at the time of the arrest, is sufficiently related to disorderly conduct to support his arrest. *See People v. Stevens,* 40 Ill.App.3d 303, 352 N.E.2d 352, 354 (1976) (upholding a conviction for disorderly conduct where the defendant told police a false story of a robbery); *see also Biddle,* 992 F.2d at 676-77 (citing cases). Further, Sparing presents no evidence to suggest that Keith extrapolated the obstructing charge from non-existent facts in order to justify a sham arrest. *See Biddle,* 992 F.2d at 676; *cf. Richardson v. Bonds,* 860 F.2d 1427, 1431 n. 3 (7th Cir. 1988) (noting that an arrest could be found invalid if an arrestee could demonstrate, with specific facts, that an arresting officer acted in bad faith). Thus, Sparing's dissatisfaction with being charged with obstructing a police officer is unavailing. Sparing's other argument, that he could not be charged with disorderly conduct because he did not file a formal police report, is equally unavailing. *See Stevens,* 352

N.E.2d at 354 (upholding a disorderly conduct conviction where the defendant gave a false story to police).

The court's inquiry into Keith's qualified immunity stops at this point. See *Chan,* 123 F.3d at 1008 (noting that qualified immunity exists if the answer to either inquiry is negative); *cf. Khuans,* 123 F.3d at 1018. However, even if the court were to continue to the second qualified immunity question, Keith would still prevail. If a § 1983 plaintiff establishes a constitutional violation, the defendant is entitled to qualified immunity, unless the plaintiff also demonstrates that the law "was so 'clearly established' that 'a reasonable official would understand that what he is doing violates that right.'" *Chan,* 123 F.3d at 1008 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). To make this demonstration, Sparing must point to either an analogous case, dealing with the same constitutional right and similar facts, or demonstrate that the violation was so obvious that a reasonable person would recognize that their actions were a violation. *See Chan,* 123 F.3d at 1008; *see also Spiegel,* 196 F.3d 717, 723 (noting that a police officer is immune to claims based on an arrest without probable cause unless it is obvious that no reasonably competent officer would have believed that there was probable cause) (citing *Malley v. Briggs,* 475 U.S. 335, 341 (1986)). Sparing fails to carry this burden. Sparing does not point to an analogous case that shows that Keith did not have probable cause. Further, as demonstrated by the above discussion, Keith's actions were not obviously violative of Sparing's rights. Put another way, Sparing fails to point to any law indicating that Keith's actions were illegal. Consequently, the answer to the second qualified immunity question is also a negative.

II.B.3 Sparing's arrest and Keith's entry

Sparing next contends that he was arrested in his home, without a warrant, and without exigent circumstances, in violation of his Fourth Amendment rights. Keith claims that he is entitled to qualified immunity because he did not arrest

Sparing in his home. The court's resolution of this issue is limited to the first qualified immunity inquiry, which the court answers in the negative.

The constitutional right at issue is the right to be free from a warrantless arrest in the home, in the absence of exigent circumstances. Again, it is axiomatic that the Fourth Amendment prohibits a warrantless entry into a home to effect an arrest, in the absence of exigent circumstances. *See Payton v. New York,* 445 U.S. 573 579-80 (1980). However, as discussed below, the court finds that Sparing's allegation is without merit.

The case of *United States v. Berkowitz,* 927 F.2d 1376 (7th Cir. 1991) decides the issue. *Berkowitz* arose from the warrantless arrest of Marvin Berkowitz at his home, and the subsequent seizure of evidence found inside the home. *See id.* at 1385-90. One of the issues on appeal was whether the trial court erred in denying Berkowitz's motion to suppress the evidence seized during Berkowitz's arrest. See id. at 1378. The parties agreed that there was probable cause to arrest Berkowitz, and that the arresting officers went to Berkowitz's home, knocked on the door, and Berkowitz answered the door. *See id.* at 1379-80. At that point, the stories diverged. According to the government, the arresting officer told Berkowitz he was under arrest immediately after Berkowitz opened the door. *See id.* at 1380. The officer claimed that Berkowitz did not resist or attempt to close the door. *See id.* Instead, Berkowitz merely asked if he could have his sports coat, which was draped over a chair inside the home, and another officer retrieved the coat. *See id.* Berkowitz disagreed, and said that after he opened his door, the officers stepped into the home, and announced the arrest. *See id.* Thus, according to the government, the arrest preceded the entry, while according to Berkowitz, the entry preceded the arrest. *See id.* On these disputed facts, the Seventh Circuit remanded the case for an evidentiary hearing

on whether the officers were inside or outside Berkowitz's home at the time the officer announced the arrest. *See id.* at 1385-90 (emphasis added).

The significance of Berkowitz is that the Seventh Circuit stated that the arrest was valid if it happened as the government claimed. *See id.* Courts generally uphold arrests where the police go to a home without a warrant, knock on the door, announce the arrest from the outside of the home, and the person acquiesces to the arrest. *See id.* at 1386 (and cases cited therein) (emphasis added). "Payton prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message of arrest from outside the home .... Moreover, there is nothing in *Payton* that prohibits a person from surrendering to police at his doorway." *Berkowitz,* 927 F.2d at 1386 (citations omitted). When a person submits to an arrest at his doorway, the arrestee "has forfeited the privacy of his home to a certain extent." Id. at 1387. In other words, "[a] person who has submitted to the police's authority and stands waiting for the police to take him away can hardly complain when the police enter his home briefly to complete the arrest." Id. On such facts, officers may enter the home after announcing the arrest to take control of the arrestee without violating the Fourth Amendment. See id.

The facts of the case at bar are indistinguishable from the government's position in *Berkowitz.* The parties do not dispute that Keith knocked on Sparing's door, Sparing answered and identified himself, and Keith told Sparing he was under arrest. At the time Keith announced the arrest, Keith was standing outside the home, and Sparing was standing inside the home behind a screen door. After Keith announced the arrest, Sparing asked if Keith had a warrant, and Keith said he did not. Then, Sparing asked if he could put something down, and walked farther into his residence. At that time, Keith entered the home. Sparing does not

argue that he did not submit to Keith's announcement of arrest, and there is no evidence to support such an argument. *Cf California v. Hodari D.*, 499 U.S. 621, 626 (1991) (holding that a person submitting to a show of authority is under arrest). This case presents the "threshold arrest" scenario that the Seventh Circuit said does not violate the Fourth Amendment. *See Berkowitz*, 927 F.2d at 1385-90. Therefore, the court finds that Sparing has not presented evidence of a constitutional violation. *See id.; see also McKinney v. George*, 726 F.2d 1183, 1188 (7th Cir. 1984) (noting that the privacy of the home is not invaded when a person surrenders to an arrest made at the threshold); *Cf. Collier v. Baker*, No. 96-C-0023, 1999 WL 543206, at *3-5 (N.D.Ill. July 23, 1999) (discussing *Berkowitz* in the context of a warrantless arrest in a suspect's home, and denying a motion for summary judgment to resolve a factual question about whether police officers had consent to enter the suspect's home).

Sparing claims that this case is controlled by *Payton*, which prohibits warrantless entries into a home to make a routine arrest, absent exigent circumstances. *See Payton*, 445 U.S. at 589-90. *Payton*, however, is readily distinguishable from the case at bar. In *Payton*, New York detectives, after two days of intensive investigation, found enough evidence to establish probable cause to believe that Thomas Payton committed a murder. *See id.* at 576. Without a warrant, six officers went to Payton's apartment to arrest him. *See id.* The officers knocked on the door, but did not get a response, even though they could see light and hear music coming from the apartment. *See id.* The officers called for assistance, and half an hour later, used crowbars to break open Payton's door. *See id.* at 576-77. As it turned out, no one was home, but the officers saw a .30 caliber shell casing in plain view, seized it, and the government introduced it at Payton's murder trial. *See id.* On such facts, the Supreme Court held that police officers must have a warrant to enter a home to effect a routine arrest, unless exigent circumstances

exist. See id. at 596-600.

In sharp contrast to the facts of *Payton,* the undisputed facts in this case establish that Keith did not break into Sparing's home to effect the arrest, and that Keith's entry into Sparing's home does not violate the Fourth Amendment. *See Berkowitz,* 927 F.2d at 1385-90. Thus, Sparing's reliance on *Payton* is unavailing. The other cases Sparing cites, *Welsh v. Wisconsin,* 466 U.S. 740 (1984), and *Illinois v. Rodriguez,* 497 U.S. 177 (1990), are similarly distinguishable. *Welsh* dealt with a warrantless entry into the home of a drunken driving suspect, and his arrest in his second floor bedroom. *See Welsh,* 466 U.S. at 743. *Rodriguez* considered a warrantless entry into a home, which was based on the consent of a person that did not have common authority over the premises. *See Rodriguez,* 497 U.S. at 179. Both of these cases are inapposite to the case at bar, where Keith announced the arrest from outside the home, and Sparing acquiesced to the arrest in his doorway.

In sum, the court finds that Keith did not violate Sparing's Fourth Amendment right to be free from a warrantless arrest in his home. Thus, the court answers the first qualified immunity question in the negative, and Keith is entitled to qualified immunity. *See Chan v. Wodnicki,* 123 F.3d 1005, 1008 (7th Cir. 1997). Although the court does not reach the second qualified immunity question, the court notes that the *Payton* rule is well established, and that if the facts of this case had been within the scope of *Payton,* the result might well be different.

II.B.4 Malicious prosecution

Sparing's next claim is that both Keith and the Village are liable to him for the Illinois tort of malicious prosecution. Under Illinois law, a plaintiff must allege the following elements to state a cause of action for malicious prosecution: "(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the

termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff." *Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill.2d 455, 564 N.E.2d 1222, 1231 (1990) (citations omitted); see also *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996).

Keith and the Village make two arguments for summary judgment. First, they argue that they are entitled to summary judgment because the existence of probable cause is an absolute bar to a claim of malicious prosecution. *See Biddle*, 992 F.2d at 678. Second, Keith and the Village argue that the Illinois Tort Immunity Act immunizes public officers from liability, unless the officers acted wilfully and wantonly.

Sparing disagrees, maintaining that Keith did not have probable cause, and that a jury must decide whether Keith acted wilfully and wantonly. As evidence of Keith's allegedly wilful and wanton conduct, Sparing contends that: (1) Keith did not fully investigate Sanfratello's alleged crime of forging his name on Smith's checks; (2) Keith did not seek legal advice prior to arresting Sparing; (3) Keith did not obtain an arrest warrant; and (4) Keith tried to force Sparing to testify against Smith. As outlined below, the court need not address whether Keith's conduct was wilful and wanton.

The court's earlier finding of probable cause necessarily dooms Sparing's malicious prosecution claim. Illinois has a "strict requirement that a malicious prosecution plaintiff show ... that the action complained of ... was commenced maliciously and without probable cause." *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill.2d 267, 685 N.E.2d 1347, 1357 (1997) (noting that Illinois law disfavors an action for malicious prosecution); *see also Juriss v. McGowan*, 957 F.2d 345, 349 n. 1 (7th Cir. 1992) ("[A] person arrested with probable cause cannot cry false arrest"). In this case, Sparing is unable to succeed on his malicious prosecution claim because the court has already found that

Keith had probable cause to arrest Sparing. Thus, an essential element of the claim fails, and Keith and the Village are entitled to summary judgment.

The court also notes that Sparing utterly fails to present evidence to support his prima facie case of malicious prosecution. As stated earlier, summary judgment is the "put up or shut up" stage of a lawsuit, where the party opposing the motion must present evidence that could convince a trier of fact of the merits of the claim. *See Shank,* 192 F.3d at 682 (citing *Schacht,* 175 F.3d at 503-04). Sparing presents no evidence that the criminal charges against Sparing were resolved in his favor, or that Keith acted with malice. The court is not obliged to "scour the record" to find Sparing's evidence, and declines to do so in this case. *See Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 922 (7th Cir. 1994). Further, as discussed below, Sparing's claimed damages are not recoverable. Therefore, the court has an additional basis on which to grant summary judgment in favor of Keith and the Village on Sparing's claim of malicious prosecution.

II.C Damages

Although the issue is now moot, the court agrees with Keith and the Village that Sparing's lost investment damages are not recoverable. A § 1983 case is a tort claim, and the damages available are governed by general principles of tort law. *See Memphis Comm. Sch. Dist. v. Stachura,* 477 U.S. 299, 305-06 (1986); *see also Button v. Harden,* 814 F.2d 382, 383 (7th Cir. 1987). A tort plaintiff does not recover all damages that arise from "but for" causation. *See Movitz v. First Nat'l Bank of Chicago,* 148 F.3d 760, 762-65 (7th Cir. 1998). The plaintiff is only entitled to recover those damages that are foreseeable. *See id.* (and cases cited therein). Here, Sparing's claimed damages are anything but foreseeable. According to Sparing, his arrest prevented him from being named to the board of directors of a corporation that was in the process of being formed, and which the corporate

promoters planned to take public. As a director, Sparing would have had the opportunity to purchase 100,000 shares of stock at $0.075 per share. The parties dispute whether Sparing was actually chosen to be on the board of directors of the new corporation, or was merely being considered as a director. In any event, Sparing was not a director at the time of his arrest, and never purchased any stock. Further, the court is unaware of whether the stock was available for purchase at the time of Sparing's arrest, or if the new corporation had even been incorporated when Sparing was arrested. Finally, the stock is not yet being publicly traded. Nonetheless, Sparing claims that he is entitled to the difference between the stock's current value and the price at which he would have purchased the stock, $0.075 per share. Put another way, Sparing wants Keith and the Village to pay him for an investment he did not make. In addition to the patently speculative nature of the damages, Sparing fails to present any evidence to suggest that Keith and the Village had reason to foresee the claimed damages. Sparing's argument is similar to that of an angry teenager, who tells his parents that he did not choose to be born, and is just as unavailing. *See Movitz,* 148 F.3d at 762-65 (and cases cited therein).

III. CONCLUSION

The court finds that Keith has qualified immunity against Sparing's claims brought under 42 U.S.C. § 1983. The court also finds that Sparing's malicious prosecution claim is barred by the existence of probable cause for Keith to arrest Sparing. Further, the court finds that Sparing fails to present evidence of essential elements of his malicious prosecution claim. For the foregoing reasons, the court grants Defendants' motion for summary judgment, and denies Plaintiff's motion for partial summary judgment. Case terminated.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
2 6 2002
OFFICE OF THE CLERK

No. 01-1230

IN THE

Supreme Court of the United States

EUGENE SPARING,

Petitioner,

v.

VILLAGE OF OLYMPIA FIELDS and JAMES KEITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The petitioner, Eugene Sparing, ("Sparing") brought this action under 42 U.S.C. § 1983 alleging that James Keith ("Keith"), a police officer with the Village of Olympia Fields (the "Village"), violated Sparing's Fourth Amendment rights by entering his home and arresting him without a warrant and without probable cause. Petitioner also invoked the district court's supplemental jurisdiction to assert the Illinois tort of malicious prosecution against Keith and the Village (where appropriate, "Respondents"). Keith moved for summary judgment on petitioner's Fourth Amendment claims arguing that (1) the doorway arrest of Sparing was lawful and did not violate the Fourth Amendment warrant requirement, (2) Sparing's arrest is supported by probable cause, and (3) Keith is entitled to qualified immunity. As to petitioner's state law claim, Respondents argued that probable cause existed and is an absolute defense to this claim.

Sparing's arrest arose out of an alleged scheme organized by a friend named David Smith. Smith filed a criminal report with the Olympia Fields Police Department on July 23, 1996. In his Complaint, Smith alleged that he fired Tom Sanfratello on May 31, 1996, and that Sanfratello later stole files from the office and forged two checks made out to himself. Smith also stated that on the morning of July 9, 1996, Sparing saw Sanfratello in the office. According to Smith, Sparing knocked on the window to get Sanfratello's attention, but Sanfratello did not respond. *266 F.3d 684, 686.*

In mid-August of 1996, Officer James Keith called Sparing to confirm his part of Smith's story. Sparing did. Keith next interviewed Sanfratello, who disputed the story in several respects, but admitted to signing the checks because

he was a signatory on the account and was owed money by Smith. He also admitted to taking files, but claimed to have returned them to Smith. Sanfratello also told Keith that he previously had a conversation with Sparing's secretary, Linda Parker, who told him that she had a facsimile sent by Smith to Sparing and that she believed that they were "up to no good." Sanfratello provided a copy of that fax to Keith; it read:

> *Gene*
>
> July 9, 1996 at 2:45 a.m. observed Tom at office copying files from computer and photocopying. You knocked on windows and Tom ignored you. You left and went home.
>
> Thanks
>
> David

Id. The next day, Keith had a telephone conversation with Parker. According to Keith, Parker said that after receiving the fax from Smith, she made a copy and gave the original to Sparing, who replied, "Dave wants me to perjure myself." *Id.*

The following day, (August 15, 1986), Parker telephoned Keith, recounting to him an encounter she recently had with Sparing. She said that Sparing had contacted her to have lunch and that when he picked her up, he asked with whom she had been talking that week. Parker initially feigned ignorance, but Sparing persisted. He drove her by the Olympia Fields Police Department to "refresh [her] memory," and again asked with whom she had been talking, this time informing her that a friend of Sanfratello had already put him in the

know. She then admitted to talking with the police about the facsimile from Smith. Sparing, according to Parker, replied, "I thought you were my friend. How could you do this to me? Don't you know that this could lead to criminal charges against me?" Parker told Keith that Sparing then took her back home, told her to get out of the car and that she was fired. He also told Parker that he was evicting her from the house she was renting from him and taking back his van on which she was making payments. Later that day, Keith spoke with Parker again, and she told him the same story. *266 F.3d at 686-687.*

After the meeting with Parker, Keith went to Sparing's house and knocked on the door. Sparing answered the door, and Keith asked that he identify himself, which he did. At that moment, Sparing was still standing inside his home behind his closed screen door, and Keith was standing outside. Keith then advised Sparing that he was under arrest.[1] To which, Sparing inquired whether he had a warrant. Keith stated that he did not, but rather that he had probable cause. Sparing asked whether he could place something down, then turned, and walked away from the screen door further into his home. Keith entered the residence, taking several steps inside. Sparing came back to Keith, and they both left the house. *Id.*

Sparing filed a lawsuit against the Village of Olympia Fields and Officer James Keith alleging violations of federal civil rights law as well as Illinois state law. Sparing alleged in his complaint that his arrest was in violation of the Fourth Amendment, and he sought damages under 42 U.S.C. § 1983.

1. In his deposition, Keith indicated that he arrested Sparing for obstructing a police officer, although he also had in mind the offense of disorderly conduct.

Specifically, Sparing complained that Keith arrested him in his home without a warrant and without probable cause. He also alleged that the Village and Keith maliciously prosecuted him in violation of the Illinois tort law. *266 F.3d at 687.*

The district court held that Sparing had failed to demonstrate a constitutional violation, and that Keith was entitled to qualified immunity. The district court concluded that the arrest did not violate the Fourth Amendment because Sparing acquiesced to Keith's entry to complete an arrest announced outside his home, and because probable cause existed for an offense closely related to the one for which Sparing was arrested. Having found probable cause for the arrest, the district court also concluded that Sparing could not meet the elements of malicious prosecution. The district court then entered judgment in favor of the Village and Keith. The appeal to the Seventh Circuit followed. *Id.*

The Court of Appeals held that: (1) Sparing's warrantless arrest violated his Fourth Amendment rights; but (2) Officer Keith was entitled to qualified immunity because the law surrounding doorway arrests was not clearly established at the time of Sparing's arrest, and because probable cause for the arrest existed under the closely-related offense doctrine; and (3) criminal case did not terminate in a manner indicative of Sparing's innocence. Petitioner seeks review of the Seventh Circuit's decision on these issues.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD BE DENIED BECAUSE THE PETITIONER IMPROPERLY SEEKS REVIEW OF THE SEVENTH CIRCUIT'S FINDING IN HIS FAVOR THAT THE WARRANTLESS DOORWAY ARREST AT ISSUE VIOLATED THE FOURTH AMENDMENT AND, IN ANY EVENT, THE COURT'S FINDING OF QUALIFIED IMMUNITY ON PETITIONER'S WARRANTLESS ARREST CLAIM WAS CORRECT BECAUSE THE LAW SURROUNDING DOORWAY ARRESTS WAS NOT CLEARLY ESTABLISHED

A. Petitioner Improperly Seeks Review of the Court of Appeals' Finding that The Warrantless Doorway Arrest Violated the Fourth Amendment

Petitioner improperly seeks review of an issue on which he prevailed below. Specifically, the petitioner is asking this Court to review the Court of Appeals' finding in his favor that Officer Keith violated Sparing's Fourth Amendment right by making a slight entry (taking a few step inside) into Sparing's home after announcing the arrest from outside as Sparing stood in the threshold of an open interior doorway behind a closed screen door. Respondents disagree with this finding and maintain as they did below that Keith's slight entry into Sparing's home under the facts and circumstances of this case did not violate the Fourth Amendment. In any event, the finding of the Court of Appeals is not a proper subject for this Court's review as the determination below was in favor of the petitioner. Therefore, the only issue on which the petitioner can properly seek review is on the issue

of qualified immunity asserted by Officer Keith on the plaintiff's Fourth Amendment warrantless arrest claim under 42 U.S.C. § 1983.

B. The Seventh Circuit Properly Found That Officer Keith Was Entitled To Qualified Immunity Because The Law Surrounding Doorway Arrests Was Not Clearly Established Or Settled At The Time Of This Arrest

Respondents maintain that the warrantless doorway arrest of Sparing did not violate the Fourth Amendment and disagree with the finding below. Indeed, the Respondents argued below that *United States v. Berkowitz*, 927 F.2d 1376, 1387 (7th Cir. 1991) supported their position that the warrantless arrest of Sparing under the facts and circumstances of this case did not violate the Fourth Amendment. In *Berkowitz,* the Seventh Circuit held:

> if the police go to an individual's home without a warrant, knock on the door, announce from outside the home that the individual is under arrest when she opens the door to answer, and the individual acquiesces to a slight entry to complete the arrest, the entry is reasonable under the Fourth Amendment and consistent with *Payton*.

Id. Here, Respondents presented undisputed evidence that Sparing did not object or otherwise protest the arrest following Officer Keith's announcement, but asked only if he could put his portable telephone down, took a few steps back inside to set the telephone down, returned to Keith (who had taken a few steps inside behind Sparing) and then left the residence with Keith. The evidence was also

uncontested that Sparing was actually placed under arrest and handcuffed outside of the front of his residence in the driveway. Respondents maintained below that under *Berkowitz*, the law in the Seventh Circuit at the time of this arrest in August of 1996 established that the arrest of Sparing comported with the Fourth Amendment. *See Berkowitz*, 927 F.2d at 1387 (upholding slight entry into the home to complete an arrest announced outside the home when the individual acquiesced to the entry while standing fractions of an inch behind the threshold of her home with the door open as reasonable under the Fourth Amendment.)

The Court of Appeals disagreed with the Respondents' position, but went on to consider Officer Keith's qualified immunity defense to Sparing's Fourth Amendment warrant claim applying the two-part test in accordance with Supreme Court precedent. First, the court considered whether Sparing alleged the deprivation of an actual constitutional right. *266 F.3d at 688.* In light of its holding that the warrantless arrest violated the Fourth Amendment, the first prong was met. The court then considered whether the second part of the test was satisfied, *i.e.*, whether that right was clearly established at the time of the alleged violation. *Id.* The Seventh Circuit concluded that the law surrounding Fourth Amendment "doorway arrest" questions, particularly on the facts of this case, was not sufficiently settled or defined at the time of this arrest to defeat qualified immunity, relying generally on *Joyce v. Town of Tewksbury*, 112 F.3d 19 (1st Cir. 1997) (en banc) *Id. at 691.*

In *Joyce*, the police went to the plaintiff's parents' home to arrest him for violation of a domestic violence restraining order. The police did not have a search warrant. Plaintiff answered the officers' knock at the door by opening the

interior door, but keeping the outer screen door closed. The police informed plaintiff he was under arrest, and asked him to step outside. Instead, the plaintiff retorted "ya right" and withdrew from the doorway, calling for his mother. The officers followed the plaintiff into the house and arrested him inside. The arrest occurred on August 6, 1989. 112 F.3d at 20-21. The plaintiff in *Joyce* brought suit against the police alleging Fourth Amendment violations for the alleged illegal entry into the plaintiff's parents' home without a warrant. *Id.* at 21. The First Circuit held that the police were entitled to qualified immunity and stated as follows:

> Given the unsettled state of the law, we have no hesitation in concluding that the officers in this case are protected by qualified immunity, which protects public officials against section 1983 liability so long as they acted reasonably. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). As the Supreme Court has said, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The aim is to protect those who might otherwise be deterred from official duties for fear that an innocent mistake would create personal liability.
>
> * * * *
>
> The critical point here is that Officers Donovan and Budryk are "entitled to qualified immunity [so long as] their decision was reasonable, *even if mistaken*." (Citation omitted). Thus, the officers are not liable unless in

> the circumstances of this case, it is reasonably well-established, and should therefore have been clear to the officers, that the entry without a search warrant was unlawful. Because it is not even clear that there was a violation – a point that we do not decide – there certainly was no violation so patent as to strip the officers of qualified immunity.

112 F.3d at 23.

The law surrounding doorway arrests under the facts and circumstances of this case did not become any more clear between the time of the arrest in *Joyce* on August 6, 1989 and the date of the arrest involving Sparing on August 15, 1996. Under the qualified immunity defense, a rule of law is not clearly established if a defendant could not be said to know that it prohibited his conduct. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Accordingly, the Seventh Circuit properly granted qualified immunity to Keith on Sparing's Fourth Amendment warrant claim under Section 1983.

II. THE WRIT SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT PROPERLY APPLIED THE "CLOSELY RELATED OFFENSE" DOCTRINE AND ITS DECISION IS CONSISTENT WITH THE FOURTH AMENDMENT AND THE VIEW OF OTHER CIRCUITS

A. The Seventh Circuit's Application of The Closely Related Offense Doctrine Was Proper and Comports With The Fourth Amendment

The Seventh Circuit correctly found there was probable cause for Sparing's arrest under the closely related offense doctrine, relying on *Biddle v. Martin*, 992 F.2d 673, 676

(7th Cir. 1993). In *Biddle*, the plaintiff was arrested for obstructing a police officer in violation of 720 Illinois Compiled Statutes 5/31-1 for refusal to provide his name and identification, as well as swearing and shouting at a police officer which prevented the officer from filling out a tow report for the plaintiff's vehicle. *Id.* at 674. The charge against the plaintiff was eventually dismissed. Plaintiff sued for false arrest and for malicious prosecution under Section 1983. *Id.* at 674. The district court granted summary judgment for the officers, finding that the plaintiff's unlawful arrest claim was without merit because the officers had probable cause to arrest him for obstruction of justice, disorderly conduct, and for allowing someone to operate his vehicle in a manner contrary to law. On appeal, the Seventh Circuit upheld the district court's decision, citing *Richardson v. Bonds*, 860 F.2d 1427 (7th Cir. 1988) (holding that probable cause need not exist on the charge for which a plaintiff was arrested, so long as probable cause exists for arrest on a closely related charge.) Using an objective standard, the Seventh Circuit in *Biddle* determined a reasonable police officer could have believed, even mistakenly, that she had probable cause to arrest plaintiff on one of the charges offered in justification. 992 F.2d at 678.

In the case at bar, both the district court and the Seventh Circuit found that probable cause did not exist for the charge of obstructing a police officer (the offense for which Sparing was arrested and charged) because Sparing's conduct could not be considered a "physical act" which is a necessary element of the offense, relying on *People v. Hilgenberg*, 223 Ill.App.3d 286, 585 N.E.2d 180, 183-184 (2d Dist. 1991) (holding Illinois criminal statute, 720 ILCS 5/31-1, prohibiting any person from "resisting" or "obstructing" peace officer does not proscribe mere argument with police

about validity of arrest, but proscribes only some "physical act" which imposes obstacle which may impede, hinder, interrupt, prevent or delay the performance of officer's duties.) However, here the Seventh Circuit found probable cause existed for the closely related offense of disorderly conduct under Illinois criminal law. The disorderly conduct statute provides:

> (a) A person commits disorderly conduct when he knowingly:
>
> * * * *
>
> (4) Transmits or causes to be transmitted in any manner to any peace officer, public officer or public employee a report to the effect that an offense will be committed, is being committed, or has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense will be committed, is being committed, or has been committed [.]

720 ILCS 5/26-1(a)(4).

Sparing contended that this section of the Illinois disorderly conduct did not apply because the statute requires a written report, and that the report must falsely identify an offense, not simply acts that may be part of a criminal offense. *266 F.2d at 691*. The Seventh Circuit disagreed with both of these contentions. First, the court correctly interpreted Illinois case law, in particular, *People v. Stevens*, 40 Ill.App.3d 303, 352 N.E.2d 352 (1st Dist. 1976), which established that either written or oral reports may satisfy the element of a "report"

in the statute. *Id* at 354. The Seventh Circuit rejected Sparing's attempt to distinguish *Stevens*, as well as Sparing's other contention that the defendant in *Stevens* reported a "robbery," arguing that Sparing only relayed information to Keith about what he had observed and never stated that an "offense" had been committed. The Seventh Circuit flatly rejected plaintiff's creative arguments and held: "[t]he plain language of the statute is not limited to false reports of an offense, but covers false reports 'to the effect that an offense . . . has been committed.' 720 ILCS 5/26-1(a)(4)." *266 F.3d at 692*. The Seventh Circuit correctly concluded that when Sparing told Keith that he had seen Sanfrantello in the office copying files from a computer and photocopying, it was to corroborate Smith's accusation of criminal trespass and properly held "[Sparing's] report had the effect of falsely conveying to a police officer that an offense had been committed." *Id*.

In applying the closely related offense doctrine in *Biddle v. Martin*, 992 F.2d 673, 676 (7th Cir. 1993), the Seventh Circuit observed:

> While an arresting officer's subjective knowledge of facts sufficient to constitute probable cause is central to evaluation of the propriety of an arrest, *we do not believe that the officer's view of the legal basis for the arrest is important.* (Emphasis added) Under the principles of *Harlow v. Fitzgerald* and the Fourth Amendment, an objective standard applies where the parties present alternative legal justifications for an arrest. The issue is whether a reasonably competent police officer, with knowledge of the facts actually

> known by the arresting officer, would have concluded that probable cause existed to arrest for the offense offered as justification.

Id. (quoting *Richardson v. Bonds*, 860 F.2d 1427, 1430-31 (7th Cir. 1988).

The closely related offense doctrine comports with the Fourth Amendment while at the same time strikes a balance between two competing concerns. First, that police officers making warrantless arrests should not be forced "to routinely charge every citizen taken into custody with every offense that they thought he could be held for in order to increase the chances that at least one charge would survive the test for probable cause." *Trejo v. Perez*, 693 F.2d 482, 485 (5th Cir. 1982). Second, that police officers should not be allowed "to justify what from the outset may have been actually sham or fraudulent arrests on the basis of *ex post facto* justifications that turn out to be valid." *Gassner v. City of Garland, Tex.*, 864 F.2d 394 (5th Cir. 1989). By limiting the application of this doctrine to cases where a police officer lacks probable cause to make a warrantless arrest for the charged offense, but nevertheless possessed probable cause to make a warrantless arrest for an uncharged offense *arising from the same conduct* (emphasis added), the federal courts have both grasped the realities of modern law enforcement and protected well-established Fourth Amendment freedoms. *Biddle v. Martin*, 992 F.2d 673, 676-77 (7th Cir. 1993).

Accordingly, the Seventh Circuit correctly found that probable cause existed for the closely-related charge of disorderly conduct and properly held that Officer Keith was entitled to summary judgment on plaintiff's Section 1983 false arrest claim.

B. The Seventh Circuit's Application Of The Closely Related Offense Doctrine Is Consistent, Rather Than In Conflict, With Other Circuit Decisions

Contrary to the plaintiff's suggestion, the Seventh Circuit's application of the closely related offense doctrine is consistent with other federal circuit decisions. For example, the only case relied on by the plaintiff is *Sheehy v. Town of Plymouth*, 191 F.3d 15 (1st Cir. 1999). In *Sheehy*, the plaintiff was arrested for assault and battery with a dangerous weapon, as a result of a dispute with his neighbor, and for disorderly conduct for not cooperating with the investigating officers, *i.e.*, refusing to identify himself. Both charges were later dismissed, and the plaintiff filed a claim against the Town and the arresting officer for false arrest. The district court entered summary judgment in favor of the arresting officer, adopting the related crimes defense. *Id* at 17. On appeal, the First Circuit reversed finding that material questions of fact existed as to the facts underlying the arrest for disorderly conduct and, therefore, summary judgment on qualified immunity grounds was improper. 191 F.3d at 19-20. No such dispute exists here.

Nevertheless, *Sheehy's* discussion of the related crimes defense sets forth the same analysis utilized in the instant case. First, the crime with which the plaintiff is charged and the crime offered to the court as justification for the arrest must relate to the same conduct. Second, the two crimes must share similar elements or be directed generally at prohibiting the same type of conduct. *Id*. The *Sheehy* court further observed the related crimes defense "allows the arresting officer to choose which crime she will charge without having to charge every single offense sustainable on the facts, and yet does not open the door to the extrapolation of offenses in an effort to justify a sham arrest," relying on *Biddle v. Martin*, 992 F.2d 673, 677 (7th Cir. 1993). *Id* at 20.

The Seventh Circuit's analysis in this case is consistent with the two-part test applied in *Sheehy*. First, the offense charged (obstructing a police officer in violation of 720 ILCS 5/31-1),[2] and the uncharged offense (disorderly conduct in violation of 720 ILCS 5/26-1(a)(4), *supra*) relate to the same conduct by Sparing, *i.e.*, provision of false information to a police officer. Second, the two criminal offenses (obstructing a police officer and disorderly conduct) do share similar elements and are directed generally at prohibiting the same type of conduct, *i.e.*, interference with the efficient administration of criminal justice.

The decision in this case is also consistent with the other federal circuit decisions applying the closely-related offense doctrine. In *Avery v. King*, 110 F.3d 12 (6th Cir. 1997), the plaintiff was arrested for forcibly interfering with a federal officer's administration of justice. The district court found that the officer lacked probable cause to arrest the plaintiff under the offense charged because he did not use force or threat of force as required by the statute. 110 F.2d at 14. However, the Sixth Circuit found that the offense charged was "sufficiently" related to the offense of wilful obstruction offered in justification for the plaintiff's arrest and, therefore, probable cause existed for plaintiff's arrest. 110 F.2d at 15.

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2. Article 31. Interference With Public Officers

5/31-1. *Resisting or obstructing a peace officer*

(a) A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer . . . of any authorized act within his official capacity commits a Class A misdemeanor. *720 Illinois Compiled Statutes 5/31-1.*

See, e.g., *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1180 (5th Cir. 1990) (holding that although the police officers may have improperly arrested the plaintiff for trespassing after he loudly and abusively questioned their authority, they were entitled to qualified immunity because the plaintiff's loud and abusive conduct provided them with arguable probable cause to arrest him for disorderly conduct); *Trejo v. Perez*, 693 F.2d 482, 485 (5th Cir. 1982) (finding that although police officer lacked probable cause to arrest the plaintiff for disorderly conduct for using vulgar language in response to request for identification, the officer was entitled to raise the defense that he had arguable probable cause to arrest the plaintiff for the related offense of failing to furnish the requested identification). *See also Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994) ("probable cause may still exist for a closely related offense, even if that offense was not invoked by the arresting officer, as long as it involves the same conduct for which the subject was arrested"); *Gassner v. City of Garland, Tex.*, 864 F.2d 394, 396-400 (5th Cir. 1989) (holding that the police officer was entitled to qualified immunity because he had arguable probable cause to arrest Gassner for disobeying the order of a police officer enforcing the traffic laws even though the district court found that there was not arguable probable cause to arrest Gassner for the charged offense of disorderly conduct.)

For the reasons discussed, the Seventh Circuit properly applied the closely related offense doctrine in the instant case, and there is no conflict among the federal circuits which warrants this Court's review.

III. THE WRIT SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT PROPERLY FOUND THAT THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT CRIMINAL CASE WAS TERMINATED IN A MANNER INDICATIVE OF SPARING'S INNOCENCE AND PROPERLY GRANTED SUMMARY JUDGMENT TO THE VILLAGE AND KEITH ON STATE LAW MALICIOUS PROSECUTION CLAIM

Petitioner also seeks review of the Seventh Circuit's decision upholding summary judgment on plaintiff's supplemental state law malicious prosecution claim. The Seventh Circuit, reviewing the district court's summary judgment on that claim *de novo,* upheld the second of two grounds relied on by the district court. The Seventh Circuit disagreed with the district court's analysis that probable cause on the closely related offense defeated the state law claim of malicious prosecution of the plaintiff for the crime of obstructing a police officer. The Seventh Circuit found that no Illinois case had expressly adopted the closely related offense doctrine at least in malicious prosecution tort cases. Therefore, the Seventh Circuit declined to rest its opinion on this ground. *266 F.3d at 692.* However, because Illinois law does require that the criminal proceeding upon which a malicious prosecution action is predicated be terminated in a manner indicative of the innocence of the accused (*Joiner v. Benton Community Bank*, 82 Ill.2d 40, 411 N.E.2d 229, 232 (1980)), the Seventh Circuit affirmed summary judgment on the lack of this element. *Id.*

The Seventh Circuit properly found that Sparing could not meet his burden as to this element of his claim. The evidence presented showed that the criminal case was

dismissed because the arrest was effected without a warrant. A prosecutor's conclusion that dismissal is warranted because the illegal arrest of the accused might jeopardize the prosecution is hardly a dismissal indicative of the innocence of the accused as required under Illinois tort law. A favorable termination, for purposes of a malicious prosecution claim, must be one that deals with the factual issues of the case. *Ienco v. City of Chicago*, 148 F. Supp. 2d 938, 944 (N.D. Ill. 2001), *reversed on other grounds*, 2002 WL 548891 (7th Cir. 2002).[3] *Ienco* involved the arrest and prosecution of a defendant involved in a debt collection matter who was unlawfully arrested and searched, and convicted on a number of charges, which were subsequently reversed on appeal. The evidence used in the original criminal case was reliable, but suppressed because of the illegal arrest. Since the original conviction was reversed, the court determined that the parties never reached the merits of the case. *Id.* at 945. Similarly, in this case, the criminal court never reached the merits of the case against Sparing and consequently, there was no determination of the factual issues of the case. The district court correctly held, and the Seventh Circuit correctly affirmed summary judgment, based on this element.

The plaintiff challenges the procedure because the district court raised this element *sua sponte*. However, the district court was not precluded from doing so. In *Wolf v. Buss (America)*, 77 F.3d 914 (7th Cir. 1996), the plaintiff successfully argued that under Federal Rule of Civil Procedure 56(c), a district court's consideration of a summary judgment motion is not limited to the content of the parties' pleadings, but is expanded to include depositions, answers to interrogatories, and admissions on file in addition to any

3. Only the Westlaw citation is currently available.

affidavits. *Id.* at 921. Viewing the record beyond the summary judgment motion allowed the court to enter summary judgment. Notably, in *Wolf*, the plaintiff's *petition for certiorari* was denied by the United States Supreme Court (519 U.S. 866), and a request for rehearing on the *petition for certiorari* was denied as well. (519 U.S. 1023). Likewise, the Tenth Circuit has adopted an identical rule. In *Wilder v. Prokop*, 846 F.2d 613 (10th Cir. 1988), the court held that a district court could grant summary judgment on grounds other than those raised in a motion before the court if the facts were developed and showed entitlement of the non-moving party to summary judgment. *Id.* at 623.

An appellate court can affirm a lower court judgment based on any reason that is supported by the record. The Seventh Circuit properly determined that plaintiff could not meet his burden under Illinois tort law because as a matter of law, the dismissal of a criminal prosecution because of a defective arrest was not a termination in a manner indicative of the plaintiff's innocence. *See, e.g., Ienco v. City of Chicago, supra*; *Dobiecki v. Palacios*, 829 F. Supp. 229, 235 (N.D. Ill. 1993) (termination of criminal proceedings for technical failure to comply with *Miranda* does not indicate innocence for purposes of malicious prosecution claim); *Booker v. Ward*, 888 F. Supp. 869, 877 (N.D. Ill. 1995) (dismissal of criminal proceeding following suppression of evidence based on "technical" grounds not termination in a manner "indicative of innocence" under Illinois law).

Both the district court and the Seventh Circuit correctly concluded that the only evidence in the record showed that the criminal action was "dismissed for lack of warrant". The plaintiff sees some injustice based on the district court's raising the issue *sua sponte*. However, the court could

reasonably conclude that that fact could not be disputed. How could it? Moreover, even if it could be disputed, the plaintiff was not prevented in any way from pointing the dispute out to the courts below in a post-judgment motion. Plaintiff had ample opportunity to argue the legal question of whether such a dismissal could be indicative of innocence and lost on that point. For these reasons, the Seventh Circuit properly affirmed the summary judgment in favor of the Village and Officer Keith on plaintiff's state law malicious prosecution claim.

CONCLUSION

As a result, the *Writ* should be denied.

Respectfully submitted,

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